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Notes

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by
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Introduction

The Social Security Act ("the Act") was passed in 1935[1] in order to alleviate the problems associated with an expanding elderly population and the difficulties such persons were encountering in trying to take care of themselves financially.[2] As with any insurance program, Social Security was established on the assumption that more participants would pay into the system than were expected to be paid out from the system.[3] This assumption was based on the fact that when the first Social Security checks were mailed in 1940, only 54 percent of the men and 61 percent of the women who paid Social Security taxes could expect to celebrate their 65th birthdays and start collecting benefits.[4] And even those lucky enough to reach retirement age could only expect to collect benefits for an average of fourteen years before dying.[5]

However, these figures tell only half the story. African-Americans, as a group, have never received a proportionate share of the benefits paid out of the Social Security trust fund compared to the taxes they have paid in.[6] While the original Social Security Act of 1935 contained a number of provisions designed explicitly to exclude

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1. Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935).

2. *See* Helvering v. Davis, 301 U.S. 619, 642 (1937) (discussing the purposes of the Social Security Act).

3. *See, e.g.*, Nancy J. Altman, *The Reconciliation of Retirement Security and Tax Policies: A Response to Professor Graetz*, 136 U. PA. L. REV. 1419, 1429-30 (1988).

4. *See* George J. Church & Richard Lacayo, *Social Insecurity*, TIME, Mar. 20, 1995, at 24, 28.

5. *Id.* At age 65, men had a life expectancy of 78 years, women 80 years.

6. *See infra* notes 24-25.

African-Americans,[7] the current discrepancy is due primarily to the fact that African-Americans have a significantly lower life expectancy than white Americans.[8] Since all workers pay into Social Security at the same rate,[9] but become eligible for full benefits only upon reaching age 65,[10] the lower life expectancies of African-Americans result in the program serving as a wealth transfer from black to white Americans.[11]

This Note argues that this discriminatory effect of the Social Security Act,[12] when considered along with the purposefully invidious race-based motivations underlying the origins of the Act, violates the equal protection component of the Due Process Clause of the Fifth Amendment.[13] This Note also proposes a number of solutions—both judicial and legislative—to the racial inequalities inherent in the Act.

Part I describes the discriminatory impact of the Social Security Act on African-Americans and demonstrates congressional indifference to the problem in recent and proposed legislative amendments to the Act.

Part II argues that the Act violates the Constitutional guarantees of equal protection and should therefore be struck down by the

7. *See infra* notes 74-86.

8. The life expectancies for white and black male infants born in 1990 are 72.7 years and 64.5 years, respectively. The life expectancies for white and black females born that year are 79.4 and 73.6, respectively. U.S. Nat'l Ctr. for Health Statistics, *Vital Statistics of the United States (annual)*, reported in U.S. Dep't of Com., STATISTICAL ABSTRACT OF THE UNITED STATES, tbl. No. 115, at 87 (1994).

9. 42 U.S.C. §§ 1401, 3101, 3111 (1995). Given that there is an earnings cap, however, with wages over that cap not taxed under Social Security, low-income earners actually pay a higher rate than do those with incomes over the cap. 42 U.S.C. § 430 (1995).

10. This retirement age is scheduled to be raised to age 67 for those Americans born after 1960. 42 U.S.C. § 416(l)(1)(E) (1995).

11. *See The '80s in Black and White*, ORANGE COUNTY REG., July 28, 1992, at B8. Note that this criticism could be made for any identifiable group who has a lower than average life expectancy, such as smokers or the poor. However, these groups do not receive the same treatment under the Court's equal protection jurisprudence as do those individuals who are members of a "protected class" based on immutable characteristics such as race or gender. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) (noting that the Equal Protection Clause does not require absolute equality between the wealthy and the poor). Furthermore, it is unlikely that a member of such a group could prove the requisite intent for finding an equal protection violation. *See supra* text accompanying notes 3-9.

12. Although this note addresses only the Social Security system, the discriminatory effects and problems addressed are equally applicable to other retirement benefit programs such as Medicare or state pension plans.

13. The Fifth Amendment reads in pertinent part, "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The Supreme Court has inferred an equal protection component of the Fifth Amendment's Due Process Clause. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

courts. Section A of Part II summarizes the United States Supreme Court's equal protection jurisprudence in situations where the enactment or administration of a legislative act has given rise to statistical racial discrepancies. Section B of Part II then reviews the racially discriminatory history of the Social Security Act and applies the facts of the particular inequality currently engendered by the Act to the Court's equal protection framework.

Part III discusses possible congressional responses to the problem. Section A of Part III considers a race-based amendment to the Social Security Act in light of recent Supreme Court cases concerning racial and gender preferences, and applies the facts of the Social Security inequalities to that body of law. Section B of Part III then reviews a number of possible race-neutral congressional responses to the racial discrepancies of the current Act. This section urges that given the constitutional mandate for equal protection under the laws, Congress can, and must, consider the effects of any proposed amendments to Social Security on remedying the current adverse impact of the Act on African-Americans.

I. The Discriminatory Impact of Social Security on African-Americans

A. Life Expectancies of White Americans and African-Americans

African-Americans have a significantly lower life expectancy than white Americans.[14] The reasons for this discrepancy are uncertain and the proffered explanations are varied—among the possibilities suggested by commentators are that African-Americans suffer generally higher poverty rates,[15] are more likely to engage in backbending labor,[16] have comparably higher rates of illness and disability,[17] and are more prone to the effects of street violence.[18]

The actuarial tables illustrate the stark results of these phenomena. A white male infant born in 1990 can expect to live to an age of 72.7 years.[19] His black male counterpart, however, will live, on aver-

14. *See* actuarial data *infra* Part IA.

15. *See* Allen L. Otten, *People Patterns*, WALL ST. J., June 14, 1988, at 37.

16. William E. Gibson, *Medicare, Social Security Cuts Collapse*, FT. LAUDERDALE SUN-SENTINEL, Dec. 15, 1994, at 1A.

17. Sarah Pekkanen, *SSA Commissioner Takes Aim at "Myths," Politics Behind Rumor of Inadequate Funds, King Says*, BALT. EVE. SUN, Mar. 5, 1992, at 1A.

18. Jack Germond & Jules Witcover, *Tax-Cut Stampede Kills Serious Budget Reform*, BALT. SUN, Dec. 15, 1994, at 2A.

19. U.S. Nat'l Ctr. for Health Statistics, *Vital Statistics of the United States (annual)*, and *Monthly Vital Statistics Reports*, reported in U.S. Dep't of Com., STATISTICAL ABSTRACT OF THE UNITED STATES, tbl. No. 115, at 87 (1994).

age, to the age of 64.5.[20] The life expectancies for white and black females born that year are 79.4 and 73.6 years, respectively.[21] This difference in the longevity of African-Americans and whites has been fairly consistent throughout the twentieth century, even as the life expectancies of all Americans have steadily increased. In 1935, for example, the year that the Social Security Act was passed,[22] white and black males born that year could expect to live to 61.0 and 51.3, respectively, while white and black females could expect to live to 65.0 and 55.2.[23] Thus, from the moment the Social Security Act was passed until the present, glaring discrepancies have existed in the numbers of whites and African-Americans who actually live to retirement age.

B. The Effects of Life Expectancy Differences on Social Security Benefits

Full Social Security benefits are scheduled to be paid upon reaching age 67 for those Americans born after 1960.[24] The effect of the eight-year difference in life expectancies between black and white men is magnified by the fact that an individual must survive to at least retirement age before becoming eligible to collect from the system. Thus, even assuming the longer life expectancies of those born in 1990, the average African-American male will die two-and-a-half years before the age at which he can receive full benefits. The average white male, however, will live past retirement age and receive benefits for 5.7 years. In pure dollar terms, the average black male will die before receiving a single dollar in benefits, while the average white male will receive $42,800.[25] The discrepancy for females is similar,

20. *Id.*

21. *Id.* This Note uses the life expectancies of African-Americans and whites for comparison primarily because these data are less readily available for other racial and ethnic groups, particularly for prior decades. In addition, while the discriminatory impact of the Social Security Act exists for many ethnic groups which have a lower than average life expectancy rate, the only group which has suffered from intentional discrimination under the Act, a critical element of equal protection jurisprudence, is African-Americans. *See infra* text accompanying notes 51-70.

22. Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301-1397(f) (1995)).

23. Dep't of Health, Education, and Welfare, annual reports, and *Vital Statistics of the United States (annual)*, reported in U.S. Dep't of Com., STATISTICAL ABSTRACT OF THE UNITED STATES, tbl. No. 62, at 58 (1960).

24. 42 U.S.C. § 416(l)(1)(E) (1995). Reduced benefits are available at age 62. 42 U.S.C. § 402(a)(3)(B) (1995). Full benefits are available at age 65 for those born before 1936, with a sliding scale for those born between 1936 and 1960. 42 U.S.C. § 416(l)(1) (1995).

25. This figure assumes the average 1991 monthly Social Security benefit for retirees of $629. Given that this average figure includes payments to men and women, and that men generally receive higher payments due to their higher lifetime earnings, the black-white discrepancy is actually even greater. *See Social Security Bulletin*, reported in U.S.

with the typical African-American woman expected to receive benefits for 6.6 years compared to 12.4 years for whites.

While the courts and Congress have given little attention to this situation,[26] some commentators in the mainstream press have noted the problem. Columnist Walter Williams observes, "The only official racism left in America is Social Security racism. . . . It's a racial ripoff; they know I'm going to croak eight months before eligibility starts and the white guy is going to get at least eight years or so of benefits."[27] The National Caucus on the Black Aged recognized the problem as far back as 1970 and urged Congress to take racial differences in life expectancy into account in amending the Social Security Act.[28] Some generally conservative sources have also proven sympathetic to the problem, with the Orange County (CA) Register editorializing that the current system "is a massive robbery from black taxpayers to white recipients."[29] Even commentator and two-time presidential candidate Pat Buchanan has acknowledged this discrepancy.[30]

Official Social Security acknowledgment of the problem has been scant, however. In a classic glass-is-half-full argument, Robert Myers, the former chief actuary of Social Security, observed that his tables show that 50.1% of African-American males born today will make it to age 67, so it's "certainly not a total washout."[31] Others have suggested that, with higher mortality rates, at least African-Americans will receive a disproportionate amount of survivor benefits.[32] Survivor benefits are available, however, only to the surviving spouse and minor children of deceased workers, are much smaller than regular benefits, and at any rate are not disproportionately paid out to African-Americans.[33] Social Security Commissioner Gwendolyn S. King

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Dep't of Com., STATISTICAL ABSTRACT OF THE UNITED STATES, tbl. No. 583, at 377 (1994).

26. *See infra* notes 36-42, 75-101.

27. Walter Williams, *Little Abuses Add Up to Height of Injustice*, CINCINNATI ENQUIRER, Nov. 20, 1994, at F3.

28. Jacquelyne Johnson Jackson, *Social Security Should Be a True Insurance Program*, DURHAM HERALD-SUN, Nov. 29, 1994, at A8.

29. *The '80s in Black and White*, *supra* note 11, at B8.

30. *See* John Hanchette, *Sharp Tongue, Quick Wit, Could Come Back To Haunt Buchanan*, GANNETT NEWS SERVICE, Feb. 26, 1992 (quoting Pat Buchanan).

31. Spencer Rich, *Inside: Health and Human Services, Senior Aide May Leave Post He's Held Less than a Year*, WASH. POST, July 15, 1985, at A13.

32. *See id.*; *see also* David L. Randall, *Who's Subsidized?*, CHI. TRIB., Mar. 16, 1990, at 24.

33. 42 U.S.C. § 402(d), (e), (f); *see* Katharine Silbaugh, *Turning Labor Into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 68 (1996) (observing that survivor benefits are unavailable to the children of a woman who was never married; she must rely on less generous AFDC benefits). 68.1% of African-American children were born to unmarried mothers in 1992 compared to 22.6% of white children. U.S. Dep't of Com., STATISTICAL ABSTRACT OF THE UNITED STATES, tbl. No. 94, at 77 (1995). Thus, it is unlikely that Afri-

bravely but inexplicably asserts that "[i]t is precisely because of the African-American mortality rates, it is because of the comparably high rates of illness and disability . . . , that Social Security is such a critically important program for black Americans."[34]

Social Security is a two-stage program: before retirement age working Americans pay into the program; after retirement, they are then paid from the system. African-Americans are affected adversely by this system on both ends. On the pay-in side, Social Security taxes are regressive in that they take a greater percentage of the earnings of low-income taxpayers—a group that includes a disproportionate number of African-Americans—than from high-income taxpayers.[35] On the pay-out side, after retirement, Social Security is highly progressive; recipients with lower lifetime incomes receive a greater proportion of their earnings than do those with higher lifetime incomes.[36] Thus, the progressive pay-out side would essentially make up for the regressive pay-in side of Social Security if all Americans lived the same number of years past retirement. But, as seen above in Part IA, this is not the case, and the lower life expectancies of African-Americans rob them of this benefit. In short, since African-Americans on average do not live as long after retirement as do white Americans, they never reap the benefits of the progressive pay-out system even though they suffer the inequalities on the regressive pay-in side.

C. Congressional Failure To Confront the Life Expectancy Differences

Although life expectancy differences between black and white Americans have been significant since the original enactment of the Social Security Act in 1935,[37] in amending the Act Congress has continued to treat all taxpayers as equally situated.[38] For example, since the 1970s, retirement benefits have included automatic annual cost of

can-American children could receive a disproportionate amount of Social Security survivor benefits, although they may receive a disproportionate share of AFDC.

34. Pekkanen, *supra* note 17.

35. This is due to three features of the program. First, Social Security taxes are imposed only on wages, and thus exclude unearned investment income which is more likely to be earned by higher-income taxpayers. Second, Social Security is taxed at a flat rate, with no deductions or exemptions as with income taxes. Third, Social Security taxes are only imposed on the first $65,000 of income, resulting in lower-income earners paying a higher total percentage of their earnings. Jonathan Berry Forman, *Promoting Fairness in the Social Security Retirement Program: Partial Integration and a Credit for Dual-Earner Couples*, 45 TAX LAW. 915, 928 (1992); 42 U.S.C. §§ 415(a)-415(e) (1995). The median family income of African-Americans in 1992 was $21,161, while that of whites was $38,909. U.S. Bureau of the Census, *Current Population Reports, P60-184.*

36. Forman, *supra* note 35, at 935; 42 U.S.C. § 415(a) (1995).

37. *See supra* notes 22-23.

38. As this Note illustrates *infra* in section IIB, there is much evidence that this failure indicates intentional racism.

living adjustments,[39] which assist those who have reached retirement age, but do nothing for the disproportionate number of African-Americans who do not. During the Social Security funding crisis of the early 1980s, the congressional response was to dramatically raise the tax rate, exacerbating the regressive effects of the pay-in side of the program.[40]

Recent changes to the program indicate a continued lack of concern for the black-white discrepancies. For example, the 1983 amendments to the statutes raised the retirement age from 65 to 67,[41] which markedly increased the racial gap in the number of post-retirement years in which one could collect benefits. In addition, Senators Bob Kerry and John Danforth have proposed further raising the retirement age to 70, a revision that would only continue to compound this problem.[42] While it may be true that changes in Social Security are necessary to maintain the solvency of the program,[43] future modifications should take into account the effects on African-Americans and other minorities. Some possible legislative remedies are discussed below in Part IIIB.

II. A Judicial Response to the Discriminatory Effect

As demonstrated above, Congress appears to have shown little concern for the discriminatory impact of Social Security on African-Americans. The current system favors whites over African-Americans, and the proposed changes to the law will only continue and exacerbate this inequality.[44] It is the province of the courts to minimize

39. Social Security Amendments of 1973, Pub. L. No. 93-233, 87 Stat. 947 (1973) (codified as amended at 42 U.S.C. § 415(i) (1973)).

40. The 1983 amendments raised the employee's tax rate from 5.08% for 1980 wages to 6.20% for 1990 wages. Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (1983). In fact, these higher rates arguably have pushed more lower-income taxpayers into greater poverty, a factor which may contribute to lower life expectancy in the first place. For example, in part because of rising Social Security taxes, the total federal tax burden on a family of four at the poverty line rose from 1.8% of income in 1979 to 10.4% by 1985. *The Next Tax Reform,* THE NEW REPUBLIC, Sep. 15 & 22, 1986, at 5.

This method of increasing revenue will ultimately lead to tax rates that are even more crippling. Once the baby boom generation starts to retire en masse in the near future, if benefits are maintained at today's levels those entering the work force today will have to pay at least 33% of their income into Social Security, according to the CATO Institute. *Social Security: Prospects for Real Reform,* NAT'L J., Aug. 17, 1985, at 1917.

41. Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (1983).

42. Robert A. Rosenblatt, *Social Security is Target of Plan to Control Deficit,* L.A. TIMES, Dec. 10, 1994, at A1.

43. For more on this issue, see *infra* note 129.

44. *See supra* notes 36-42. It might be noted that these racial discrepancies are also sure to be amplified by an additional demographic development: the percentage of non-whites among younger, tax-paying Americans is sure to increase in coming decades due to immigration and other factors. In 1992, for example, 68.6% of 5-13 year-olds were non-

such inequalities by defining the limits by which the democratically elected legislature can act and by protecting the rights of the minority to be free from the "tyranny" of the majority.[45]

Section II of this Note will summarize the current framework of the Supreme Court's equal protection jurisprudence as it pertains to this problem. Then, it will apply the facts of the discriminatory nature of the Social Security Act to this framework and argue for striking the Act as violative of the equal protection component of the Due Process Clause of the Fifth Amendment.

A. The Current State of Equal Protection Jurisprudence—The "Purpose" Requirement

The principle of equal protection under the laws is a guarantee that no person will suffer intentional and arbitrary discrimination in the administration of a law. Professor Laurence Tribe observes that under equal protection principles, "[t]he Constitution may be offended not only by individual acts of racial discrimination, but also by government rules, policies or practices that perennially reinforce the subordinate status of any group."[46] While action by the states is governed under the explicit Equal Protection Clause of the Fourteenth Amendment to the Constitution,[47] *federal* legislative actions, such as the Social Security Act, are governed under the penumbral equal protection component of the Due Process Clause of the Fifth Amendment.[48]

While the discriminatory impact of the Social Security Act on African-Americans is clear,[49] this impact alone is insufficient to make out a claim of an equal protection violation. As the Supreme Court made explicit in *Washington v. Davis* in 1976, "our cases have not embraced the proposition that a law or other official act, without regard

hispanic whites, compared to 79.6% of 44-49 year-olds. U.S. Dep't of Com., STATISTICAL ABSTRACT OF THE UNITED STATES, tbl. Nos. 20-21, at 20-21 (1994). The proportion of whites among the elderly, however, will remain roughly the same until several decades later. Since Social Security benefits are paid out of the taxes of current workers, this will effect an additional transfer of wealth from the increasingly non-white young to the white elderly.

45. ROBERT H. BORK, THE TEMPTING OF AMERICA 39-41 (1990).

46. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1516 (2d ed. 1988).

47. U.S. CONST. amend. XIV, § 1.

48. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("[This] Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."). *See also* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (stating that the Due Process Clause of the Fifth Amendment contains an equal protection component).

49. *See supra* notes 14-23.

to whether it reflects a racially discriminatory *purpose*, is unconstitutional solely because it has a racially disproportionate impact."[50]

Washington v. Davis involved a challenge to a written personnel test for District of Columbia police officer recruits.[51] The plaintiffs, two African-Americans who had failed the test, claimed the exam was racially discriminatory in violation of their Fifth Amendment equal protection rights because a disproportionate number of African-Americans failed this test.[52] They argued that the Constitutional equal protection analysis should be the same in that case as that for employment discrimination cases decided under Title VII of the Civil Rights Act of 1964, in which discriminatory intent is irrelevant.[53] The critical inquiry under Title VII is whether the employment test disproportionately affects an identifiable group such as African-Americans, absent proof that the test is related to job performance.[54] The Court rejected the challenge, observing that the standard for adjudicating equal protection claims is not the same as for Title VII claims.[55] The Court required a showing of discriminatory purpose behind legislation to hold an act unconstitutional; a mere showing of some disparity in the impact of a law on certain groups proved insufficient.[56] The reasoning is that nearly every piece of legislation will affect one group differently from another, and the court is unwilling to micro-manage Congress by rendering suspect every such statute when the legislature acts without racial motivation and otherwise rationally.[57]

However, a discriminatory impact on African-Americans such as can be shown with Social Security is still of important consequence in equal protection analysis. In *Washington v. Davis*, while holding that impact, standing alone, was not enough to make out a successful claim, the Court added that "[d]isproportionate impact is not irrele-

50. Washington v. Davis, 426 U.S. 229, 239 (1976) (emphasis added).

51. *Id.* at 233.

52. *Id.*

53. *Id.* at 236-37. *See also* Griggs v. Duke Power, 401 U.S. 424, 430 (1971).

54. *See* Griggs v. Duke Power, 401 U.S. at 132.

55. Washington v. Davis, 426 U.S. at 239.

56. *Id.* The "purpose" requirement must be met even when a statute explicitly makes certain classifications, unlike the Social Security Act, which are facially neutral. *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970) (noting that in "the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect"). *See also* Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252, 264-65 (1977) (reaffirming the *Washington v. Davis* "purpose" requirement). In that case, the plaintiffs had challenged a local municipal decision not to grant a request to rezone certain property from a single family to a multi-family classification for the purposes of building low-income housing. *Id.* at 254. Although the failure to rezone disproportionately impacted racial minorities, who comprised 40% of the eligible tenants for the proposed housing, the Court found no evidence of discriminatory purpose and, consequently, no violation of the Equal Protection Clause. *Id.* at 269-71.

57. *See* Jefferson v. Hackney, 406 U.S. 535, 548-49 (1972).

vant" in making out a claim of intentional discrimination.[58] In fact, a showing of impact alone has sometimes sufficed for the Court to infer purposeful discrimination in the enactment or administration of laws. For example, in a number of cases the Court has accepted statistical disparities as prima facie proof of an equal protection violation in the selection of a jury venire.[59] In *Gomillion v. Lightfoot* the Court found that an alteration of city boundaries that excluded 395 out of 400 black voters was "tantamount for all practical purposes to a mathematical demonstration" that the State acted with a discriminatory purpose.[60] And in *Yick Wo v. Hopkins*, the plaintiff's showing that none of the over 200 Chinese applicants for a municipal laundry permit were successful, while nearly all white applicants were granted a permit, was sufficient to find a constitutional violation.[61]

Although a showing of clear, adverse impact is relevant, the Court will not strike down a law on equal protection grounds absent some proof of purposeful discrimination, and the Court is unlikely to infer such intent solely from the racial disparities in the administration of Social Security noted above in Part IA. The Court confronted a similar set of statistics in the 1987 case of *McCleskey v. Kemp*, in which an African-American man convicted of murder and sentenced to death showed that the race of a murder victim, and to a lesser extent, of a defendant, statistically affected verdicts to the detriment of black defendants.[62] The defendant provided statistics showing that among two thousand murder cases tried in Georgia during the 1970s, black defendants were several times more likely to receive the death penalty than were white defendants, particularly if the victim was white.[63] The Court held that these statistics alone were not enough to

58. Washington v. Davis, 426 U.S. at 242.

59. *See* Castaneda v. Partida, 430 U.S. 482, 495-96 (1977) (2-to-1 disparity between Mexican-Americans in county population and those summoned for grand jury duty proved discriminatory intent); Turner v. Fouche, 396 U.S. 346, 359 (1970) (1.6-to-1 disparity between blacks in county population and those on grand jury lists was a sufficient showing); Whitus v. Georgia, 385 U.S. 545, 552 (1967) (3-to-1 disparity between eligible blacks in county and blacks on grand jury venire was a sufficient showing).

60. Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960). This case was decided on Fifteenth Amendment grounds, not on equal protection grounds. Nonetheless, the Court's finding of a discriminatory purpose based on a statistical disparity is consistent with my argument.

61. Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886).

62. McCleskey v. Kemp, 481 U.S. 279, 286 (1987).

63. *Id.* The statistics, compiled by David Baldus, showed that black defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases. Baldus also found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims, 32% of the cases involving white defendants and white victims, 15% of the cases involving black defendants and black victims, and 19% of the cases involving white defendants and black victims.

make out an equal protection claim.[64] In fact, the court held that even if the legislature was *aware* of these racial discrepancies when enacting death penalty procedures, this still did not necessarily prove a discriminatory intent. Justice White wrote that "'discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[65]

Finally, one recent case involving statistical racial disparities is relevant to the problem posed in this Note. The Court's 1992 decision in *United States v. Fordice* indicates that the equal protection requirements can be violated by the *maintenance* of a program that had its origins in a purposefully discriminatory action.[66] In that case, the Court considered the statistical evidence of racial segregation in Mississippi's higher education system: the state's flagship universities had student populations that were 80 to 91% white, while the three "black" public universities in the state had student bodies consisting of 92 to 99% African-Americans.[67] Even though the Court determined that Mississippi was no longer intentionally segregating these students, it found an equal protection violation and an affirmative duty on the state to undo the effects of prior discrimination.[68] With Justice White writing for the majority, the Court held:

> If the State perpetuates policies and practices traceable to its prior system [of intentional segregation] that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system. Such policies run afoul of the Equal Protection Clause, even though the State has abolished the legal requirement that whites and blacks be educated separately and has established racially neutral policies not animated by a discriminatory purpose.[69]

Thus, under *McCleskey*, *Fordice*, and the other Supreme Court precedents involving a statistical showing of racial disparity, in order to make out a successful equal protection claim a plaintiff must demonstrate that the legislature's action was "at least in part because

64. *Id.* at 297-99.

65. *Id.* at 298 (quoting Personnel Admin. of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

66. United States v. Fordice, 505 U.S. 717, 718 (1992).

67. *Id.* at 725. Seventy-one percent of the state's black students attended Jackson State, Alcorn State, or Mississippi Valley State.

68. *Id.* at 744 (O'Connor, J., concurring).

69. *Id.* at 731-32.

of" the discriminatory effects that it would have on a group.[70] The statistical disparities can then reinforce the showing of purposeful discrimination.[71] Finally, the maintenance of a policy shown to have discriminatory effects can violate equal protection even if later modifications to the law are enacted without discriminatory purpose.[72]

The legislative history of the Social Security Act strongly reflects racial animus, as this Note will show below in Part IIB. This fact, when coupled with the continuing adverse effects on African-Americans, brings the Act under the ambit of the Court's equal protection jurisprudence mandating strict scrutiny.[73]

B. Addressing the Social Security Racial Discrepancy Under the Current Equal Protection Framework

(1) The Legislative History of the Social Security Act

In enacting the Social Security Act of 1935, Congress was doubtless acting primarily out of concern for the financial situation of older Americans, a dire situation made worse by the Great Depression.[74] However, the details of the Act were the subject of great debate. A complete history of the 1935 legislation is beyond the scope of this Note, but a few illustrations of this debate indicate that racism played a significant role in the design of the program. Southern congressmen were opposed to federal encroachment on the states' ability to set their own standards for determining benefits and to differentiate among individuals in whatever manner the states considered reasonable.[75] In particular, the southern delegation was averse to providing any aid to African-Americans.[76] Edwin E. Witte, the Executive Director of the Committee on Economic Security in 1934-35, has written that "[t]he southern members did not want to give authority to anyone in Washington to deny aid to any state because it discriminated against negroes in the administration of old age assistance."[77]

70. McKlesky v. Kemp, 481 U.S. at 298 (internal quotation marks and citation omitted).

71. Washington v. Davis, 426 U.S. at 241-42.

72. United States v. Fordice, 505 U.S. at 731-32.

73. *See* Adarand Constructors, Inc. v. Pena, 518 U.S. —, 115 S. Ct. 2097, 2113 (1995) (holding that all racial classifications, whether imposed by local, state, or federal government, must be analyzed under a strict scrutiny standard).

74. For a summary of Congress' concerns in enacting the Social Security Act, see J. Cardozo's opinion in Helvering v. Davis, 301 U.S. 619, 634-46 (1937).

75. *See* statement of Representative Howard W. Smith of Virginia in the House Hearings on the Act, *reported in* STATUTORY HISTORY OF THE UNITED STATES: SOCIAL SECURITY 124-25 (Robert B. Stevens, ed. 1970).

76. *See* EDWIN E. WITTE, THE DEVELOPMENT OF THE SOCIAL SECURITY ACT 144 (1963).

77. *Id.*

The Jackson (Mississippi) Daily News editorialized, "The average Mississippian can't imagine himself chipping in to pay pensions for able-bodied negroes to sit around in idleness on front galleries, supporting all their kinfolks on pensions, while cotton and corn crops are crying for workers to get them out of the grass."[78] Senator Byrd of Virginia, a member of the Senate Finance Committee in 1935, voiced a concern shared by nearly all the southern delegation on the Social Security committees that the measure might serve as an "entering wedge" for federal interference with the handling of "the Negro question" in the South.[79] Edwin Witte, whose committee was largely responsible for drafting the Act, writes that due to the southern resistance, "it was apparent that the bill could not be passed as it stood," given the inclusion of African-Americans in the program.[80]

During the Senate Hearings on the bill, National Association for the Advancement of Colored People representative Charles H. Houston urged passage of the bill in its original form while acknowledging the difficulties in getting any southern congressmen to vote for a bill "if Negroes are to benefit from it in any large measure."[81] Nevertheless, in order to procure the necessary support of the southern legislators, substantial modifications to the bill were made before the final vote which adversely affected African-Americans in ways that continue to the present.

The Act omitted from coverage agricultural and domestic workers, excluding 3.5 million of 5.5 million African-American workers.[82] This was despite—or because of—testimony before the House Committee on Labor that "[p]ractically 85% of the Negroes in the South are agricultural workers."[83] In addition, the southern opposition forced a compromise that returned much of the control over Social Security to the states.[84] This allowed the states to include racially discriminatory practices in the administration of the program. For exam-

78. WILLIAM LEUCHTENBERG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, *1932-1940* 131 (1963). *See also* Stevens, *supra* note 75, at 124-25 (statement of Representative Howard W. Smith at the House hearings on the Act: "To put [an elderly African-American] on a pension at 65 of $30 a month is not only going to take care of him, but a great many of his dependents, relatives, and so on, who could much better be employed working on a farm.").

79. WITTE, *supra* note 76, at 143-44.

80. *Id.* at 144.

81. Stevens, *supra* note 75, at 122.

82. *See Economic Security Act: Hearings on S. 1130 Before the Senate Comm. on Finance, 74th Cong., 1st Sess.* 644 (1935) (statement of Charles H. Houston of the NAACP).

83. *Unemployment, Old Age and Social Insurance: Hearings on H.R. 2822 Before the House Comm. on Labor, 74th Cong., 1st Sess.* 147 (1935) (statement of Manning Johnson of the League of Struggle for Negro Rights). *See also* David R. Francis, *Why the Black-White Wealth Gap Is So Big*, CHRISTIAN SCI. MON., July 28, 1995, at 9.

84. WITTE, *supra* note 76, at 144.

ple, many Social Security programs in the South operated under "the assumption that the Standard of living of the Negro and his cost of living do not rise above the barest subsistence."[85] Consequently, "there was a tendency to grant lower sums, especially in the South, to aged blacks than to aged whites."[86]

Amendments to the Act which Congress later passed exacerbated these direct, intentional adverse effects on African-American workers. For example, while in 1939 Congress added spouse and widow benefits to those (largely white) workers who were covered under the Act, the majority of occupations in which African-Americans were employed remained excluded from coverage.[87]

Finally, the choice of age 65 as the threshold for eligibility for retirement benefits in 1935 reflected a disregard for an already stark discrepancy in life expectancies between African-Americans and whites at the time. While 52.9 percent of white male and 60.5% of white female Americans could be expected to reach this retirement age and start collecting benefits, only 29.3% of male and 30.8% of female African-Americans could do so.[88] Thus, even for those African-Americans who worked in areas that were covered under the Social Security Act, 70% could expect to die before receiving a single benefit check.[89]

(2) The Lasting Effects of the Discriminatory Purposes of the Social Security Act

In *Washington v. Davis*, the seminal case requiring a showing of intentional race discrimination to mount an equal protection challenge, the Supreme Court noted that "the basic equal protection principle [is] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[90] In *McCleskey v. Kemp*, the Court described the type of showing that would suffice to establish a discriminatory purpose warranting strict scrutiny of a statute: that the legislature selected or reaffirmed a particular course of action, *at least in part*, because of its

85. F. Davis, *The Effects of the Social Security Act upon the Status of the Negro* 157 (1939) (unpublished Ph.D. dissertation quoted in Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1365-66 (1987)). *See also* Stevens, *supra* note 75, at 124-25 (statement of Representative Howard W. Smith at the House hearings on the Act).

86. J. FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 354 (6th ed. 1988).

87. 53 Stat. 1362 (1939).

88. Dep't of Health, Ed., and Welfare; Nat'l Office of Vital Statistics, *Vital Statistics of the United States (annual)*.

89. The committees holding hearings on the 1935 Act had extensive actuarial tables at their disposal. *See* WITTE, *supra* note 76, at 144-45.

90. Washington v. Davis, 426 U.S. at 240.

adverse effect on an identifiable group.[91] Justice Powell noted in *Arlington Heights v. Metropolitan Housing Corp.* that a plaintiff need only show "that a discriminatory purpose has been a motivating factor" in the legislation.[92] It is not necessary to show that the racial discrimination was "the 'dominant' or 'primary'" purpose.[93] While this Note does not argue that the current revisions of the Social Security Act have been maintained with any intention of disadvantaging African-Americans, the original design of the Act, as noted in Part IIB(1), clearly reflect that congressional racial enmity was a "motivating factor."

Justice White, speaking for eight members of the Court in *United States v. Fordice*, spelled out the rule regarding lasting racially discriminatory effects stemming from prior discriminatory purposes in legislation:

> If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects . . . and such policies are without sound . . . justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system. Such policies run afoul of the Equal Protection Clause.[94]

Fordice concerned the lasting effects of segregation in higher education and held Mississippi's university system to be in violation of the equal protection clause of the Fourteenth Amendment.[95] The Social Security Act is similar to the situation in *Fordice* in that it has its origins in purposeful racial discrimination, and the effects of that discrimination linger to the present.[96]

While it might be argued that the discriminatory effect of the current Social Security system—originating in life expectancy differences—has little to do with the discriminatory intentions of the original Act, the *Fordice* Court did not require the lingering effect to be identical to the original, intended effect in order to violate equal

91. McCleskey v. Kemp, 481 U.S. at 298.

92. Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. at 265-66.

93. *Id.* at 265. *See also* Rogers v. Lodge, 458 U.S. 613, 622 (1982), in which the Court ordered the dismantling of an at-large system of voting that had the effect of keeping African-Americans from office, even though the system was originally designed with no discriminatory purpose. The Court held that even though the system was "racially neutral when adopted, [it] is being maintained for invidious purposes" which is a violation of the Fourteenth and Fifteenth Amendments.

94. United States v. Fordice, 505 U.S. at 731. Fordice is particularly relevant because it concerns the rights of African-Americans as a group rather than as individuals. *Compare* L.A. Dep't of Water and Power v. Manhart, 435 U.S. 702, 708 (1978) (holding that Title VII of the Civil Rights Act of 1964 was concerned with protecting individuals and that group generalizations are no defense).

95. *See supra* notes 66-69.

96. *See supra* notes 24-35.

protection. The Court specifically criticized Mississippi for continuing to maintain all eight of its state universities, observing that this perpetuated a discriminatory effect by giving the races more opportunities to segregate themselves than would be the case with a smaller number of schools. This was frowned upon even though the original purpose for opening so many schools was to comply with state laws which forbade interracial commingling.[97] Although the actual effect had changed from the original discriminatory purpose, the university system nevertheless violated the equal protection guarantee.

The only remaining inquiry under *Fordice* and the other equal protection cases noted above is whether the racially discriminatory provisions of the Social Security Act are without "sound justification" and can be "practicably eliminated."[98] The justification that Congress would most likely offer for applying the same retirement age requirements to all races is that the practice is easier to administer than an alternative. However, the Court has disavowed ease of implementation as a valid rationale for *maintaining* a racially discriminatory program in a number of contexts.[99] In *Richmond v. J.A. Croson*, for example, the Court struck down a Richmond, Virginia ordinance granting preferential treatment to minority building contractors.[100] Justice O'Connor rejected the city's claim that administrative convenience supported a fixed quota, noting that "the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification."[101] A number of possible modifications to the Social Security Act would "practicably eliminate" the discriminatory effects of the program. These modifications are discussed below in Part III.

In sum, purposeful racial discrimination in large part motivated the enactment of the Social Security Act in 1935 and its subsequent amendments. The discriminatory effects continue to the present. There is no satisfactory government justification for the maintenance of the program as it currently stands, and there are a number of functional alternatives which would alleviate the discriminatory effects. Therefore, under the equal protection framework established by the Court, the Social Security Act is unconstitutional as violative of the

97. Fordice, 505 U.S. at 741-42. The Court also noted with disapproval the different ACT score requirements among the state universities and the adverse impact these differences had on desegregation, even though these scores currently were not chosen for any improper purpose. *Id.* at 733-38.

98. *Id.* at 731.

99. *See* Richmond v. J.A. Croson Co., 488 U.S. 469, 507-08 (1989); Frontiero v. Richardson, 411 U.S. 677, 690 (1973).

100. Richmond v. J.A. Croson Co., 488 U.S. at 469.

101. *Id.* at 508.

equal protection component of the Due Process Clause of the Fifth Amendment.

III. Legislative Response to the Discriminatory Effect

The racially discriminatory effects of the Social Security Act enumerated infra in Part I could also be alleviated by the United States Congress without resorting to judicial interference. In fact, this may be the preferable method of confronting the problem as any such solution would have the stamp of approval of the majority-elected political body.

This section proposes a number of remedies to the problem. First, it outlines a race-based solution and discusses the legal consequences. Second, it summarizes a number of race-neutral modifications to the Social Security Act that would rectify the problem.

A. A Race-Based Congressional Response

The most straightforward response that Congress could take toward remedying the discriminatory effects of Social Security would be to amend the Act using race-specific means. A number of commentators have suggested some possibilities. Columnist Walter Williams proposes that Congress "race-norm" Social Security.[102] Under this proposal, African-American males would become eligible for retirement benefits at age 56 rather than age 65, so that both white and African-American males would average eight years of benefits.[103] Jacquelyne Johnson Jackson has also recommended taking into account the mortality rates and life expectancies of different races in determining Social Security taxes and benefits.[104] Conservative commentator Pat Buchanan has argued that participation in the Social Security program should be voluntary for African-Americans given that their shorter life expectancies cheat them of benefits.[105]

As a threshold matter, Congress has the authority to alter the benefits of all individuals presently covered under the Social Security

102. Williams, *supra* note 27.

103. *Id.* Williams did not mention the discrepancies as applied to African-American females.

104. Jackson, *supra* note 28. Dr. Jackson first proposed such a solution in 1968, but no longer supports this remedy. She argues instead for transforming Social Security into a true insurance program that would ensure monetary benefits for the estates of all Americans who do not live long enough to recoup their Social Security taxes. *See infra* notes 135-137.

105. Hanchette, *supra* note 30. Note the irony in that the original drafters of the 1935 Social Security Act excluded African-Americans from coverage in order to treat them unfairly. Given the likelihood that today's younger workers will fail to recover anything close to the taxes they are paying, some now want to exclude African-Americans from the program in order to *benefit* them. *See, e.g.*, Church & Lacayo, *supra* note 4, at 24.

Act.[106] If Congress were to modify the benefit schedules to eliminate the discriminatory impact on African-Americans, other persons could not complain since Congress, when enacting the original Social Security Act, expressly reserved "[t]he right to alter, amend, or repeal any provision" of the Act.[107]

While the Social Security Act has never included any facially race-based provisions,[108] the original Act and a number of subsequent amendments did contain gender-specific provisions.[109] Examining the Supreme Court decisions concerning these provisions sheds some light on the possible routes Congress could take to alleviate the racial discrimination noted in Part I.

In the 1970s the Supreme Court considered two provisions of the Social Security Act that were challenged as working to the disadvantage of women, and it consequently struck those provisions.[110] In *Weinberger v. Wiesenfeld*, the plaintiff was a widower who sought benefits under the Act based on his deceased wife's earnings.[111] Under section 402 of the Act as constructed at that time, however, such survivor benefits were only available to a widow and not to a widower.[112] The Court held this section to be in violation of the plaintiff's right to equal protection, reasoning that "such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support."[113]

Similarly, in *Califano v. Goldfarb*, the Court struck a provision of the Act on equal protection and due process grounds.[114] Under this offending provision, survivor's benefits based on the earnings of a deceased husband were payable to his widow regardless of dependency, but benefits based on the earnings of a deceased wife were payable to her widower only if he was receiving at least half of his support from her.[115] Thus, the rule of these two cases appears to be that Social

106. *See* Flemming v. Nestor, 363 U.S. 603, 608-11 (1960).

107. 42 U.S.C. § 1304 (1995). *See also* Califano v. Webster, 430 U.S. at 321. In addition, the Fifth Amendment "does not forbid statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time." Sperry & Hutchinson Co. v. Rhodes, 220 U.S. 502, 505 (1911). It follows that Congress may replace one constitutionally sound computation formula with another.

108. However, the history of the Act indicates that a number of provisions were enacted with a racially discriminatory purpose. *See supra* notes 74-89.

109. *See infra* notes 110-121.

110. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Califano v. Goldfarb, 430 U.S. 199 (1977).

111. Weinberger v. Wiesenfeld, 420 U.S. at 639.

112. 42 U.S.C. § 402(g) (1970 & Supp. III).

113. Weinberger v. Wiesenfeld, 420 U.S. at 645.

114. Califano v. Goldfarb, 430 U.S. 199 (1977).

115. 42 U.S.C. § 402(f)(1) (1970 & Supp. V).

Security provisions that work to the disadvantage of women will be held to violate the equal protection clause.

This rule does not apply to provisions which work in *favor* of women, however. In *Califano v. Webster*, the Court considered a challenge by a male plaintiff to a section of the Act which calculated the benefits due to a man differently from those due to a woman.[116] Under this provision a woman could exclude from the computation of her "average monthly wage" fourteen low earning years, whereas a similarly situated man could exclude only eleven; this resulted in a slightly higher "average monthly wage" and correspondingly higher monthly old-age benefits for retired women.[117] The Court upheld the statute because it "operated directly to compensate women for past economic discrimination."[118] Since women have been historically excluded from higher-earning jobs, the Court reasoned, this section of the Act "works directly to remedy some part of the effect of past discrimination" and is therefore not violative of the male plaintiff's equal protection rights.[119]

One interpretation of these cases suggests that amendments similar to those detailed above but intended to compensate African-Americans for historical discrimination in the labor market would also be upheld. Such provisions would simply favor African-Americans to compensate for past employment discrimination and current black/white life-expectancy differences, and they would be constitutionally sound under *Webster*. However, under more recent Supreme Court equal protection analyses of congressional acts, gender-based and race-based legislative acts are no longer scrutinized under the same standard. Gender-based statutes such as those considered in this section are subject to an intermediate level of scrutiny requiring such classifications to "serve important governmental objectives and [ ] be substantially related to the achievement of those objectives."[120] The Court had formerly applied this standard to race-based classifications made by Congress as well under its 1990 decision in *Metro Broadcasting, Inc. v. FCC*.[121]

In 1995, however, the Court overruled *Metro Broadcasting* in *Adarand Constructors, Inc. v. Pena*[122] and applied strict scrutiny to

116. Califano v. Webster, 430 U.S. at 313-16.

117. 42 U.S.C. §§ 402(a), 415(a), 415(b) (1970 & Supp. V). This section was amended in 1972 to eliminate this gender-based difference. Pub. L. No. 92-603 (1972) (codified as amended at 42 U.S.C. § 415(b) (1995)).

118. Califano v. Webster, 430 U.S. at 318.

119. *Id.*

120. Califano v. Webster, 430 U.S at 316-17 (citing Craig v. Boren, 429 U.S. 190, 197 (1976)).

121. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564-65 (1990).

122. 115 S. Ct. 2097, 2117 (1995).

acts passed by Congress. The Court there held that any such race-based classifications "must serve a compelling governmental interest, and must be narrowly tailored to further that interest" in order to withstand Fifth Amendment equal protection scrutiny.[123] *Adarand* involved a challenge to a minority set-aside program under which minority businesses were given indirect preferential treatments in subcontracting for government work.[124] The Court did not review the set-aside program under its new standard, but remanded the case to the lower courts to review the case under the correct level of scrutiny.[125]

Because the Supreme Court has not yet provided distinct guidelines under the strict scrutiny standard for congressional acts, it is unclear whether a race-based response to the discriminatory impact of Social Security would withstand judicial review as the gender-based distinctions have. However, the Court in *Adarand* did take pains to refute the idea that strict scrutiny of such legislation was "strict in theory, but fatal in fact."[126] Justice Souter, writing in dissent but interpreting the majority, pointed out that "constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination."[127] Justice Ginsburg similarly noted the "majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects."[128]

Therefore, even under *Adarand's* stricter standard, congressional action designed to eliminate the severe lingering effects of a Social Security statute designed at least in part to disfavor African-Americans would serve the "compelling governmental interest" required by *Adarand.* In addition, such modifications would not run afoul of the strict scrutiny requirement that they be "narrowly tailored measures" which do not "trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups."[129] Modifying the benefit schedules for African-Americans—or even allowing for voluntary participation in the program for African-Americans—would not significantly affect the rights

123. *Id.* at 2117.

124. *Id.* at 2101-04.

125. *Id.* at 2118.

126. *Id.* (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

127. *Id.* at 2133 (Souter, J., dissenting).

128. *Id.* at 2135 (Ginsburg, J., dissenting).

129. *Id.* at 2136 (Ginsburg, J., dissenting).

and benefits of white Americans.[130] Therefore, having satisfied all the requirements necessary to withstand the Court's strict scrutiny, such a race-based response to the problem would pass constitutional muster.

B. Race-Neutral Congressional Remedies

Congress need not respond to the problem of the racially discriminatory effect of the Social Security Act by resorting to a race-based remedy which would invoke strict scrutiny by the federal courts. A number of race-neutral remedies that would effectively eliminate the discrepancy have been proposed.[131]

The most radical, yet fairest reform as far as the problems engendered by racial life-expectancy differences are concerned, would be to privatize Social Security, i.e., to transform the program from a government insurance program to an individual investment plan. For example, the Heritage Foundation has proposed allowing any individuals who wish to do so to opt out of the current Social Security program and to receive from the government a check for their contributions to date.[132] These individuals "would then be obliged to invest that money plus all future contributions that would have otherwise gone into the Social Security trust fund into a mandatory individual retirement account (IRA)."[133] The earnings from these investments would vest in the name of the worker rather than be pooled in the single trust fund that currently manages Social Security revenues. This would allow African-Americans, or any other individuals, to collect their fair share upon retirement or disability, or would at least insure that their heirs received the accrued benefits.[134]

At the other extreme are calls to means-test the program. Under this scheme, Social Security would be transformed into a true insurance program with mandatory contributions by all workers, as under the current system, but with benefits going only to those who need

130. It is true that these provisions would engender additional costs to the program which would be spread throughout society, but these costs would merely make up for the disproportionate payments into the program that African-Americans have made.

131. There are a number of other reasons for reforming Social Security that are beyond the scope of this Note, not the least of which is the threatened insolvency of the program. For a summary of these concerns see Dorcas R. Hardy & C. Colburn Hardy, *Social Insecurity* (1991). For a fuller treatment of the pros and cons of the proposals suggested in this Note, see the sources cited *infra* in notes 132-140.

132. Church & Lacayo, *supra* note 4, at 24, 30. *See also* David Wise, *Six Initiatives to Promote Private Saving*, CHALLENGE, Nov., 1992, at 13; Forman, *supra* note 35, at 949.

133. Church & Lacayo, *supra* note 4, at 24, 30.

134. *See, e.g.*, Eric Kingson & Jill Quadagno, *Social Security: Marketing Radical Reform. The Future of Age-Based Public Policy*, American Society on Aging, GENERATIONS, Sept. 22, 1995, at 43; Wise, *supra* note 132, at 20, 26-27.

them without regard to an individual's history of payments.[135] This would convert Social Security into a welfare-type safety net with a floor of protection guaranteed for all.[136] Of course, in order to avoid the discrepancies detailed in Part I of this Note, the threshold for means-testing would have to be grounded on some basis other than age, such as disability or other inability to continue working.[137]

Finally, many reformers, including Senators Bob Kerry and John Danforth, have suggested a two-tier system of Social Security which is a hybrid of the two proposals mentioned above. Under the Kerry-Danforth plan, the Social Security tax would be cut, with 4.7% of a worker's wages being paid into the government trust fund which would be used to provide a floor of support for all retirees or disabled elderly.[138] However, the additional 1.5% of wages that are now going into the trust fund would be available to invest in a mandatory IRA in the individual worker's name.[139] This would give all workers, including the 50% who are not currently covered under any type of private pension plan, an increased pool of private assets which would help to alleviate the demand for Social Security trust fund benefits.[140]

None of these proposals is without its critics, and any fundamental changes to such an enormous program as Social Security would require a great deal of study to assess the pros and cons. However, given the stark racial discrepancies inherent in the current Social Security program, there is a great need for Congress to enact some type of reform. In considering any amendments to the Act, Congress must take into account its inequitable treatment of African-Americans. It can ameliorate these effects by either an explicit race-based response, or by a race-neutral response that eliminates the racial discrepancies, but it must at least consider the effect of any such changes on African-Americans with their shorter life expectancies. To fail to do so will

135. Peter Peterson, former Secretary of Commerce, has offered one such proposal: households with annual incomes of more than $35,000 would have their benefits reduced on a sliding scale starting at 7.5% and going up an additional 5% for every $10,000 of extra income. At incomes of $185,000 or above, households would thus lose 85% of their benefits. Church & Lacayo, *supra* note 4, at 24, 30-31. *See also* Kingson & Quadagno, *supra* note 134. Currently, benefits are pegged to an individual's past earnings. *See* Forman, *supra* note 35, at 922.

136. Church & Lacayo, *supra* note 4, at 24, 31-32. *See also* Robert Pear, *Attacks Begin on Plan to Cut Social Programs*, N.Y. TIMES, Dec. 10, 1994, at 30 (noting the public hostility to welfare programs). In effect, this proposal would greatly expand the current Supplemental Security Insurance (SSI) program. *See* 42 U.S.C. §§ 1381, 1381a, 1382a - 1382j (1995).

137. *See* Forman, *supra* note 35, at 949.

138. Rosenblatt, *supra* note 42, at A1.

139. *Id. Cf.* Wise, *supra* note 134, at 26-27 (discussing a similar reform plan offered by Senator Moynihan).

140. Wise, *supra* note 134, at 26-27.

simply perpetuate the unconstitutionally discriminatory impact that the program has produced for the last sixty years.

Conclusion

Social Security has never been an equitable system from the point of view of African-Americans. While all workers, black and white, pay into the program at the same rate, the dramatically lower life expectancies of African-Americans result in their collecting benefits from the program in proportions far below those of whites.

Much of this racial discrepancy was designed into the Social Security Act in its original 1935 formulation specifically to disadvantage African-Americans. Even though such intentional racism may not have been a factor in some subsequent revisions of the Act, the discriminatory effects linger to the present.

This Note has argued that under the United States Supreme Court's equal protection framework, particularly as articulated in *Washington v. Davis*, *McCleskey v. Kemp*, and *United States v. Fordice*, the Court should apply strict scrutiny to the Act and strike it as violative of the equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution. This unconstitutionality is grounded in the racist origins of the Act, the continued disparate effects on African-Americans, and congressional failure to remedy these effects.

Additionally, this Note has argued that Congress has the authority under the Supreme Court's equal protection guidelines to amend the Social Security Act in such a way as to directly alleviate the racial discrepancies. A number of such race-based remedies are discussed.

Finally, this Note has offered a summary of some race-neutral means by which Congress could amend the Act that would also remedy the disparate effect on African-Americans. Whatever method Congress does take in enacting future revisions of the Social Security Act, it is constitutionally and morally bound not to perpetuate the discriminatory impact that past versions of the Act have wrought.